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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

UM Capital LLC, Plaintiff and Respondent, v. LEON OZERAN, Defendant and Appellant.	B212779 (Los Angeles County Super. Ct. No. SC094507)

APPEAL from a judgment of the Superior Court of Los Angeles County, John H. Reid, Judge. Affirmed.

Leon Ozeran, in pro. per., for Defendant and Appellant.

The Dreyfuss Firm and Lawrence J. Dreyfuss for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2006, appellant Leon Ozeran purchased a condominium in Santa Monica for approximately $500,000, using two loans. Both loans were secured by deeds of trust. In March 2007, the holder of the senior deed of trust foreclosed.

In July 2007, respondent UM Capital LLC (UM) brought suit against Ozeran to recover sums due in connection with the junior loan. The complaint alleged that Ozeran executed and delivered a promissory note to Fremont Investment & Loan (Fremont). The complaint further alleged that in April 2007, Fremont assigned its rights under the note to UM Acquisitions, which re-assigned it to UM.

At trial, UM introduced into evidence a promissory note in the amount of $103,000 executed by Ozeran on March 14, 2006. UM presented two allonges dated April 30, 2007, both referencing the March 14, 2006 Ozeran note.[1] The first, executed by Mortgage Electronic Registration Systems, Inc., stated "pay to the order of UM Acquisitions without recourse."[2] The second, executed by UM Acquisitions, stated "pay to the order of UM Capital, LLC without recourse." UM also introduced a computer-generated payment history for the promissory note. Finally, UM introduced a trustee's deed upon sale, which showed that the Santa Monica condominium had been sold after foreclosure for $423,000, but that the unpaid debt to the senior lender was $445,540.

UM called a single witness, Harrison Adams, its custodian of records. Adams testified that he was familiar with UM's file for Ozeran's loan. He was

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[1] An "allonge" is essentially an endorsement of a negotiable instrument contained on a separate piece of paper rather than the back of the instrument. (See *Pribus v. Bush* (1981) 118 Cal.App.3d 1003, 1007-1009.)

[2] UM also introduced into evidence the deed of trust which secured payment of the Fremont note. The deed of trust identified Mortgage Electronic Registration Systems, Inc. as Fremont's nominee and the beneficiary.

shown the two allonges and identified them as copies of documents in UM's file. Adams explained that the computer-generated transaction history was maintained by the private loan servicer. The transaction history showed that no payments had been made on the loan. Finally, Adams explained that UM's records contained a payoff statement, which had been prepared by the prior asset manager and showed that as of November 8, 2007, the payoff for the loan, including principal, interest and late fees, was $121,331.29.

To conclude its case, UM introduced portions of Ozeran's deposition in which he testified that the property in question was a condominium, that a tenant was living there when he purchased it, that he made no attempt to evict the tenant and that he had made no payments on the note to UM.

After UM rested, Ozeran, representing himself, asked the court for a directed verdict on the ground that UM had failed to establish that Code of Civil Procedure 580b, the statutory provision that precludes recovery of deficiencies on notes secured by purchase money deeds of trust, did not apply.[3] Counsel for UM pointed out that UM had established that Ozeran had never occupied the condominium. The court denied Ozeran's motion, stating that the protection from personal liability afforded by section 580b was limited to persons who lived in or occupied the residences at issue and that the evidence established that Ozeran had not occupied the condominium. Ozeran contended that section 580b applied where the purchaser intended to occupy the property at the time of the sale, but was precluded from doing so by "impossibility." The court responded: "You have made a motion for a directed verdict. I only have [UM's] evidence before me. I don't have your side of the case . . . ." After a break, Ozeran directed the court's

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[3] Unless otherwise specified, statutory references are to the Code of Civil Procedure.

attention to *Conley v. Matthes* (1997) 56 Cal.App.4th 1453, a case which discusses the protections of section 580b, and rested without presenting any evidence.[4]

The court entered judgment in favor of UM in the amount of approximately $130,000. Subsequently, the court denied Ozeran's motion for reconsideration and awarded attorney fees and costs to UM. Ozeran appealed.

DISCUSSION

On appeal, Ozeran raises eight arguments in support of reversal: (1) section 580b protected him from personal liability on the note; (2) section 580d precluded UM from collecting on the note after the senior lender foreclosed; (3) UM failed to affirmatively prove that none of California's anti-deficiency statutes applied; (4) the trial court erred in failing to consider a "conflict" between California anti-deficiency statutes and Santa Monica rent control ordinances; (5) UM lacked standing to collect the note; (6) UM failed to mitigate damages; (7) the trial court erred in failing to resolve the disposition of Ozeran's exhibits; and (8) the damage award was excessive due to failure to credit a single payment allegedly made. We find no merit to these contentions and affirm.

1. *Section 580b*

"In California, as in most states, a creditor's right to enforce a debt secured by a mortgage or deed of trust on real property is restricted by statute." (*Walker v. Community Bank* (1974) 10 Cal.3d 729, 733.) California law generally requires

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[4] Ozeran presented a set of exhibits to the court, but did not testify concerning their content or ask that they be admitted into evidence. We granted Ozeran's request to augment the record to include these exhibits, but do not include them in our recitation of the facts as they were never properly introduced into evidence.

the creditor to rely upon his security before enforcing the debt. (*Guild Mortgage Co. v. Heller* (1987) 193 Cal.App.3d 1505, 1510; see §§ 580a, 725a, 726.) "'If the security is insufficient, [a creditor's] right to a judgment against the debtor for the deficiency may be limited or barred by sections 580a, 580b, 580d, or 726 of the Code of Civil Procedure.' [Citation.]" (*Guild Mortgage Co. v. Heller*, *supra*, at p. 1510, quoting *Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35, 38-39.) These statutes "protect debtors in certain situations from personal liability for large deficiency judgments after their property had been taken . . . , thereby preventing the aggravation of the economic downturn which would result if defaulting purchasers lost their land and[,] in addition[,] were burdened with personal liability." (*Guild Mortgage Co. v. Heller*, *supra*, at p. 1511.)

The provision at issue here, section 580b, bars deficiency judgments on purchase money notes secured by mortgages or deeds of trust. (*Conley v. Matthes*, *supra*, 56 Cal.App.4th at p. 1460; *Guild Mortgage Co. v. Heller*, *supra*, 193 Cal.App.3d at p. 1511, fn. 7.) Section 580b states in part that "[n]o deficiency judgment shall lie in any event after a sale of real property . . . under a deed of trust or mortgage . . . on a dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of that dwelling occupied, entirely or in part, by the purchaser." Thus, where a real estate transaction covered by section 580b is involved, the debtor/purchaser is protected from personal liability and the lender(s) must look solely to the property for recompense if the debtor defaults on the loan(s).

Certain matters are not in dispute. The debt incurred by Ozeran to purchase the Santa Monica condominium was a purchase money obligation. (See *CTC Real Estate Services v. Lepe* (2006) 140 Cal.App.4th 856, 858, fn. 1, quoting 4 Witkin, Summary of California Law (10th ed. 2005) Security Transactions in Real Property, § 185, p. 993 [purchase money mortgage "'is a mortgage given by the

purchaser at the time of conveyance of land, to secure the unpaid balance of the price'"].) Section 580b applies to a junior lender's note even where, as here, the junior lienor's deed of trust has been rendered valueless by foreclosure of the senior encumbrance. (*Conley v. Matthes, supra*, 56 Cal.App.4th at p. 1460; *Crookall v. Davis, Punelli, Keathley & Willard* (1998) 65 Cal.App.4th 1048, 1058, citing *Brown v. Jensen* (1953) 41 Cal.2d 193, 198.) Section 580b also applies where, as here, a purchase money obligation is assigned, rendering the assignee subject to its limitations. (*Costanzo v. Ganguly* (1993) 12 Cal.App.4th 1085, 1090.) The issue with respect to section 580b is whether the condominium meets the requirement that the "dwelling" at issue be "occupied, entirely or in part, by the purchaser." (See *Jackson v. Taylor* (1969) 272 Cal.App.2d 1, 4 [prohibition against deficiencies in section 580b permits third party lenders to recover deficiencies from "non-residential purchasers"]; *Kistler v. Vasi* (1969) 71 Cal.2d 261, 263 [where property at issue was unimproved commercial property, "section 580b [does not] preclude[] third-party lenders of purchase money for such property from obtaining a deficiency judgment"].)

Ozeran contends that the protection of section 580b extends not only to those purchasers of residential property who occupy the dwelling after purchase, but also to those who purchase a dwelling with the intent to occupy it at some indeterminate point. Ozeran cites no authority for the proposition that intent is relevant and the statute makes no reference to the purchaser's intent. (See *Prunty v. Bank of America* (1974) 37 Cal.App.3d 430, 436, quoting *People v. Superior Court* (1969) 70 Cal.2d 123, 133 [courts are to construe the express language of section 580b "'according to the usual, ordinary import' of the words employed [citation], but 'in context, keeping in mind the nature and obvious purpose of the statute'"].) The provision of section 580b at issue here was clearly intended to limit the benefits of the statute's anti-deficiency rule to persons who use third party

loans to buy residential property for the purpose of living in it, and the plain wording of the statute clearly contemplates actual occupancy once the purchase is consummated. (See *Redevelopment Agency v. Superior Court* (1970) 13 Cal.App.3d 561, 568 ["Occupancy is synonymous with actual possession"]; *People v. Simon* (1944) 66 Cal.App.2d 860, 863 ["'Occupancy' is defined . . . as 'the act of occupying; a taking possession'"]; 4 Miller & Starr, Cal. Real Estate (3d ed. 2003) Deeds of Trust, § 10:251, p. 821, [acknowledging that "on the date the loan funds are disbursed the borrower has not yet consummated the purchase and has not yet actually taken possession," and explaining that the applicability of section 580b depends on both "good-faith intent to occupy the premises at the time the loan is applied for" and "actual . . . possession within a reasonable time"].) Here, there is no dispute that Ozeran never entered into possession of the condominium.

Moreover, as UM points out, at trial Ozeran presented no evidence of his intent. After UM rested, Ozeran asked the court for a directed verdict, contending it was UM's burden to establish the inapplicability of section 580b. UM's counsel argued that UM had established that Ozeran had failed to meet the occupancy requirement of section 580b. The court denied the motion, finding that section 580b requires occupancy. Ozeran contended the statute should apply where the purchaser intended to occupy the property but was prevented from doing so by impossibility. The court pointed out that Ozeran had presented no evidence in support of his version of events. Ozeran thereafter rested without presenting any evidence. In short, the evidence was uncontradicted that Ozeran had never occupied the condominium, and there was no evidence -- whatever its potential relevance -- of his intent.

2. *Section 580d*

Ozeran also claims anti-deficiency protection under section 580d. That statute provides: "No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property . . . in any case in which the real property . . . has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust." This section prohibits a deficiency judgment in favor of a holder of a mortgage or deed of trust who has foreclosed on the subject property.

By its terms, section 580d applies to holders of mortgages or deeds of trust who foreclose on the secured property. Thus, a purchaser is protected from a deficiency judgment only from the party who foreclosed. Where there are two secured lenders and the holder of the senior deed of trust forecloses, section 580d provides no protection to the purchaser from a deficiency judgment by the junior lender. (*In re Marriage of Oropallo* (1998) 68 Cal.App.4th 997, 1002, citing *Roseleaf Corp. v. Chierighino*, *supra*, 59 Cal.2d 35 "[J]unior trust deed holders are not precluded from obtaining a deficiency judgment [on a note] when the first trust deed holder obtains the security through foreclosure . . . ."].)

3. *Burden of Proof*

Ozeran contends UM had an affirmative burden to prove that its note was exempt from California's primary anti-deficiency statutes -- sections 580b, 580d and 726 -- and that it failed to meet that burden.[5] Ozeran is mistaken with respect

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[5] Section 726 is the "one form of action" rule, which provides: "There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property." Like section 580d, the one form of action rule does not apply to a sold-out junior lender. (*National Enterprises, Inc. v. Woods* (2001) 94 Cal.App.4th 1217, 1231.) "'[T]here is no reason to compel a junior lienor to go through
(Fn. continued on next page.)

to UM's burden. The burden of proving that a debt is covered by an anti-deficiency statute is on the borrower. (See *Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 997; *O'Neil v. General Security Corp*. (1992) 4 Cal.App.4th 587, 597.) Moreover, the evidence UM introduced established the nonapplicabilty of each of those provisions. As we have said, section 580b does not apply where the purchaser does not occupy the property. UM established that Ozeran did not occupy the condominium. Sections 580d and 726 do not apply to sold-out junior lenders. (*In re Marriage of Oropallo*, *supra*, 68 Cal.App.4th at p. 1002; *National Enterprises, Inc. v. Woods*, *supra*, 94 Cal.App.4th at p. 1231.) UM established that the senior lender foreclosed in March 2007, leaving Fremont and its assignees as sold-out junior lenders. Accordingly, even had the burden rested on UM, the evidence it presented established that none of the statutory anti-deficiency provisions cited by Ozeran applied.

4. *Santa Monica Rent Control Ordinance*

Ozeran contends that the Santa Monica city ordinances precluding eviction of "participating tenants" conflicted with provisions of section 580b and that "the court failed to address [the conflict]."[6] We see no conflict. The ordinance requires

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foreclosure and sale when there is nothing left to sell.'" (*Ibid*., quoting *Roseleaf v. Chierighino*, *supra*, 59 Cal.2d at p. 39.)

[6] As explained in *Bohbot v. Santa Monica Rent Control Bd*. (2005) 133 Cal.App.4th 456, Santa Monica charter provisions generally require landlords who desire to convert rental property to condominiums to obtain a permit from the Board. (*Id.* at p. 463.) Alternatively, under the Tenant Ownership Rights Charter Amendment (TORCA), a conversion can be accomplished if the tenants are offered an opportunity to purchase their units and two-thirds support the conversion application. (*Bohbot v. Santa Monica Rent Control Bd*., at p. 460.) If the conversion is accomplished under TORCA, no "'participating tenant,'" defined as "any tenant 'residing in the building at the date of the approval of the [TORCA] application,'" may be evicted for the purposes of owner
(Fn. continued on next page.)

certain rental properties converted to condominiums to remain as rental properties for a period of time -- essentially until the tenants who lived in them at the time of conversion move or are evicted for reasons other than the intended occupancy by the owner. Section 580b does not conflict with this provision -- it simply does not apply to third party loans made for the purpose of purchasing rental property.

5. *Standing*

Ozeran contends that UM lacks standing and that there was a breach in the chain of title because "there is no evidence that [UM] has ever obtained a title to the subject property or has any rights at all to ascertain any claims under this Note and Deed" and "there is no evidence of any recording in official records of the State of California indicating legitimate transfer of ownership and/or interest in a title or [d]eed of trust securing this loan to [UM]." Ozeran has cited no authority for the proposition that a creditor on a note must obtain title to the property secured by the note or record the note in some fashion before pursuing payment of it, and we are unaware of any.

With respect to chain of title, UM contended in its complaint and at trial -- and Ozeran did not dispute -- that it obtained ownership of the note through a series of allonges. As the party to whom the final allonge referred, UM was either the holder of the note or a transferee.[7] (See *In re McMullen Oil Co.* (Bankr. C.D.

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occupancy. (*Bohbot v. Santa Monica Rent Control Bd*., at p. 463.) Units not purchased by their occupants may be sold to third parties, but the transfer is "'subject to the rights of the participating tenant to continue to occupy the unit as provided for in [TORCA].'" (*Bohbot v. Santa Monica Rent Control Bd*., at p. 464.)

[7] As explained in *Pribus v. Bush*, historically, an allonge had to be firmly affixed to the instrument and could be used only where there is no room on the back of the instrument itself to write the endorsement. (*Pribus v. Bush, supra,* 118 Cal.App.3d at pp. 1007-1008; see also *Security Pacific Nat. Bank v. Chess* (1976) 58 Cal.App.3d 555, *(Fn. continued on next page.)*

Cal. 2000) 251 B.R. 558, 567 [when payee negotiates instrument by endorsing it to another party, other party becomes its holder]; *Security Pacific Nat. Bank v. Chess*, *supra*, 58 Cal.App.3d at p. 563 [attempted negotiation, ineffective because requisite language was written on separate piece of paper, qualified as "transfer"].) Both holders of instruments and transferees are entitled to enforce them in court. (Com. Code, § 3203, subd. (b) [transfer of instrument "vests in the transferee any right of the transferor to enforce the instrument"]; Com. Code, § 3301 ["'Person entitled to enforce' an instrument means (a) the holder of the instrument . . . ."].) Ozeran has identified no legal infirmity in the allonges on which UM based its right to sue.

6. *Failure to Mitigate*

Ozeran contends that UM failed to mitigate damages because it refused a pre-litigation offer to take the property in lieu of foreclosure. As UM established, the condominium was sold by the holder of the senior deed of trust at a foreclosure sale in March 2007. The deed of sale indicated that the purchaser at the trustee's sale paid less than the amount due on the senior loan. Accordingly, Ozeran had no equity to offer, and UM's failure to accept his offer was of no consequence.

7. *Ozeran's Exhibits*

Ozeran contends the trial court erred in failing to resolve disposition of his exhibits. The record of the trial indicates that Ozeran asked that certain documents

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562-563.) The court held that where "there was sufficient space on the note itself for the indorsement," a separate allonge was "ineffective as an indorsement." (*Pribus v. Bush*, *supra*, 118 Cal.App.3d at p. 1011.) As Ozeran did not raise this point at trial, it is unclear from the record whether the allonges were secured to the notes or whether there was room on the notes themselves for endorsement.

be identified, but did not present testimony to authenticate the documents and did not ask the court to admit them. Before documents identified as exhibits may be admitted into evidence they must be properly authenticated (Evid. Code, § 1401, subd. (a)) and the proponent must formally ask for their admission in order to give the other party an opportunity to raise objections (*Semsch v. Henry Mayo Newhall Memorial Hospital* (1985) 171 Cal.App.3d 162, 167). The fact that Ozeran appeared in propria persona at trial did not grant him relief from the rules of evidence or procedure. (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638-639.) Moreover, Ozeran does not state in his brief how the failure to admit the documents prejudiced him. (See Evid. Code, § 353.) Our review of the documents in connection with Ozeran's request to augment the record did not disclose any information that would alter our views.

8. *Amount of Damage Award*

Ozeran contends that the damages awarded were excessive because UM's calculation failed to take into account a payment he allegedly made to Fremont, which he contends was evidenced by a handwritten notation in the corner of two of UM's exhibits. Ozeran's contention is not supported by the record. UM presented documents that showed the amount due on the note and Adams testified that no payments had been made. UM also presented Ozeran's deposition testimony in which he admitted having made no payments to UM on the note. An unexplained notation on an exhibit is not evidence to support that a payment had been made.

DISPOSITION

The judgment is affirmed. UM is awarded its costs on appeal.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.